IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 24, 2001

STATE OF TENNESSEE v. RONNIE LAMAR EVANS

Interlocutory Appeal from the Criminal Court for Hamilton County
No. 229235 Stephen M. Bevil, Judge

No. E2000-00327-CCA-R9-CD
May 11, 2001

The appellant, State of Tennessee, charged the defendant, Ronnie Lamar Evans, with driving under the influence (DUI), fourth offense. Prior to trial, a dispute arose about whether the defendant's prior DUI convictions are elements of the charged offense that should be proven during the State's case-in-chief or whether evidence of the defendant's prior DUI convictions should only be brought before the jury during the second, or enhancement, phase of a bifurcated trial. This court granted the State's application for an interlocutory appeal on this issue. The State now raises the following issues for our review: (1) whether prior DUI convictions are to be used only to enhance a sentence and are not elements of DUI, fourth offense; (2) whether a felony DUI trial should be bifurcated into separate phases as required by Tenn. Code Ann. § 40-35-203 (1997); and (3) whether the trial court should make a finding prior to trial as to the number of applicable prior offenses in order to determine the number of jury challenges each side may exercise and how the jury should be instructed. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Paul G. Summers, Attorney General and Reporter; Patricia C. Kussman, Assistant Attorney General; William H. Cox, III, District Attorney General; and C. Parke Masterson, Jr., Assistant District Attorney General, for the appellant, State of Tennessee.

Lloyd A. Levitt, Chattanooga, Tennessee, for the appellee, Ronnie Lamar Evans.

OPINION

I. Factual Background

As a result of an incident on July 19, 1998, the State of Tennessee charged the defendant, Ronnie Lamar Evans, with driving under the influence (DUI), fourth offense. Prior to trial, the defendant moved to exclude evidence of his prior DUI convictions during the State's case-in-chief. The defendant argued that his prior convictions should be used merely to enhance his

punishment upon conviction for the current DUI offense. In response, the State contended that the defendant's prior DUI convictions were elements of the crime of DUI, fourth offense. The State noted that other courts within the jurisdiction had concluded that prior DUI convictions are elements of the crime of DUI, second or subsequent offense, and had allowed evidence of the prior convictions to be proven by the State during its case-in-chief. The trial court found that a trial on a charge of DUI, second or subsequent offense, should be bifurcated with evidence of the defendant's prior DUI convictions being introduced only during the second, or enhancement, phase. Accordingly, the State sought an interlocutory appeal on this issue. The trial court granted a Rule 9 interlocutory appeal, and this court agreed that an interlocutory appeal was appropriate. On appeal, the State raises the following issues for our review: (1) whether prior DUI convictions are to be used only to enhance a sentence and are not elements of DUI, fourth offense; (2) whether a felony DUI trial should be bifurcated into separate phases as required by Tenn. Code Ann. § 40-35-203 (1997); and (3) whether the trial court should make a finding prior to trial as to the number of applicable prior offenses in order to determine the number of peremptory challenges each side may exercise and how the jury should be instructed.[1]

II. Analysis

A. Bifurcation

On appeal, the State and the defendant agree that DUI, second or subsequent offense, is merely an enhancement of the punishment for DUI, and therefore the defendant's prior DUI convictions are not elements of the offense; accordingly, both agree that the proceedings should be bifurcated with the jury first determining the defendant's guilt on the issue of the current DUI offense and second, upon a verdict of guilt, determining if the defendant has been found guilty of prior DUI offenses.[2] The State contends that there is a need for a uniform body of law on this issue because some courts in this particular jurisdiction do not bifurcate the proceeding.

We note that, subsequent to this court's order granting a Tenn. R. App. P. 9 interlocutory appeal, our supreme court addressed the procedure to be followed when a defendant

[1] In its brief, the State lists the following as issues presented to this court for review: (1) are the required three prior DUI convictions an element of the crime of felony DUI that must be proven in the case-in-chief; (2) should a felony DUI trial be bifurcated with separate guilt and punishment phases; (3) if the trial is bifurcated, does jeopardy attach at the finding of guilt by a jury, thus prohibiting the sentencing court from enhancing the offense to a felony; (4) if the trial is bifurcated, is the defendant entitled to the number of jury strikes allowed in a felony trial or a misdemeanor trial; (5) if the trial is bifurcated, should the jury be instructed that the blood alcohol standard is .08 (second and subsequent offense DUI) or .10 (first offense DUI); and (6) if the trial is bifurcated, should the jury be instructed concerning the minimum and maximum fines for a felony offense? However, in the body of its brief, the State argues only the three issues mentioned supra.

[2] At trial and upon original application to this court for an interlocutory appeal, the State's position was that proof of the defendant's prior DUI offenses was an element of DUI, second or subsequent offense, and therefore the State should be allowed to produce evidence of the prior convictions during the State's case-in-chief. The defendant argued that a conviction as a DUI repeat offender was an enhancement of a DUI conviction, and the proceeding should be bifurcated in order to reduce the risk of prejudice to the defendant. On appeal, the State has altered its position to mirror that of the defendant.

is charged as a multiple DUI offender. See State v. Robinson, 29 S.W.3d 476, 481-483 (Tenn. 2000). As a result of the supreme court's ruling in Robinson, there appears to be no dispute among the authorities that a DUI, second or subsequent offense, is merely an enhancement of a DUI conviction. It is well established that a bifurcation of the proceedings, in order to minimize prejudice to the defendant, is the correct procedure for trial courts to employ. As this court has previously observed;

> When the indictment alleges the accused is a second or subsequent offender, a bifurcated proceeding is mandated. The first phase of the proceeding addresses the issue of the guilt or innocence of the defendant. In addition, the jury must determine the maximum amount of fine the trial judge may assess if the defendant is punishable as a first offender. If the jury returns a verdict of guilty, the jury, not the trial judge, must determine whether the defendant is a second or subsequent offender beyond a reasonable doubt. In addition, the jury must establish the maximum fine the trial court may assess if the accused is found to be a second or subsequent offender.

State v. Sanders, 735 S.W.2d 856, 858 (Tenn. Crim. App. 1987); see also State v. Mahoney, 874 S.W.2d 627, 630 (Tenn. Crim. App. 1993), Crawford v. State, 469 S.W.2d 524, 525 (Tenn. Crim. App. 1971).[3]

The bifurcated procedure is appropriate because "[a] finding that the defendant is a subsequent offender qualifies the offender for enhanced punishment but does not constitute 'a new offense.'" State v. William M. Neely, No. 01C01-9803-CR-00125, 1999 WL 103714, at *1 (Tenn. Crim. App. at Nashville, March 2, 1999); see also Tenn. Code Ann. § 55-10-403(a)(1) (1997). Specifically, this court has stated that

> it is clear that new offenses are not created for subsequent offenders but that those found to be subsequent offenders are subject to increased punishment. It is apparent that this increased punishment is analogous to the habitual criminal statutes which our courts have consistently held do not create a new offense but only provide for an enhanced punishment.

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[3] The procedure approved in Sanders echoes the procedure approved in Crawford. Specifically, this court stated in Crawford:

> [I]n the first stage of such a case as this the jury should be permitted only to determine the question of guilt or innocence of the principal offense charged in the first count of the indictment. If the jury finds the defendant guilty under the first count, then, and only then, is it proper to present to the jury the indictment count delineating the previous like convictions and present evidence establishing them for the consideration of the jury in fixing punishment for the principal crime charged in the first count of the indictment. This procedure fairly implements the provisions of [Tenn. Code Ann. § 55-10-403(a)(1)] that in drunk driving cases punishment for the principal crime charged in the indictment may be increased upon charge and proof showing that it is the second or third or subsequent offense.

469 S.W.2d at 525.

State v. Ward, 810 S.W.2d 158, 159 (Tenn. Crim. App. 1991); see also State v. Marbury, 908 S.W.2d 405, 407 (Tenn. Crim. App. 1995). In Robinson, 29 S.W.3d at 482, our supreme court implicitly approved the rationale that underlies a bifurcated procedure for this type of offense and that was articulated in Harrison v. State, 394 S.W.2d 713, 717 (Tenn. 1965). In Harrison, our supreme court recognized that

> [t]here are limits to the human mind. We think to say to any jury, there is evidence here the defendant before you has been guilty of several prior crimes but you are not to consider this in determining his guilt or innocence of the present crime, is at best to severely test the ability of the mind to remove all prejudice therefrom.
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> . . .[W]e are of the opinion to allow a jury to have before it evidence of former convictions, at the time they are required to decide upon the defendant's guilt or innocence of the present crime, will deny to a defendant the procedural fairness due him.
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> . . .It results and we so hold, it is prejudicial error to allow knowledge or evidence of previous convictions, enhancing the penalty upon conviction of the present crime, to be placed before the jury prior to their determination of defendant's guilt or innocence of the present crime.

394 S.W.2d at 717. Accordingly, we conclude that, upon a charge of DUI, second or subsequent offense, a bifurcated trial is the appropriate procedure.

B. Peremptory Challenges

The State also asks this court to determine the number of peremptory challenges allowed a defendant charged with DUI, fourth or subsequent offense. In the instant case, the trial court was prepared to grant each side the eight (8) peremptory challenges generally afforded during a felony trial. Tenn. Code Ann. § 40-18-118 (1997) provides:

> If the offense charged is punishable by imprisonment for more than one (1) year but not by death, each defendant is entitled to eight (8) peremptory challenges, and the state is entitled to eight (8) peremptory challenges for each defendant. If the offense charged is punishable by imprisonment for less than one (1) year or by fine, or both, each side is entitled to three (3) peremptory challenges for each defendant.

For a conviction of DUI, first, second, or third offense, the maximum punishment is eleven months and twenty-nine days incarceration, coupled with a fine. See Tenn. Code Ann. § 55-10-403(a)(1).[4] However, DUI, fourth offense, is a class E felony punishable by one to six years incarceration in the Tennessee Department of Correction. See Tenn. Code Ann. § 40-35-111(5) (1997). In order to

[4] DUI first, second, or third offenses are all class A misdemeanors. See Tenn. Code Ann. § 55-10-403(m). However, DUI, fourth offense, is a class E felony. See Tenn. Code Ann. § 55-10-403(a)(1).

determine the number of peremptory challenges each side possesses, the trial court must look to the offense *as charged*. See Tenn. Code Ann. § 40-18-118. Accordingly, we conclude that when the State charges a defendant with DUI, fourth offense, each side is entitled to eight (8) peremptory challenges.

C. Jury Instructions

The State also raises the following issues: (1) whether, if the trial is bifurcated, the jury should be instructed that the defendant's intoxication may be inferred upon proof that the defendant's blood alcohol content at the time of the offense was .08 percent (the inference allowed in cases of DUI, second or subsequent offense) or .10 percent (the inference allowed when the defendant is a first time DUI offender); and (2) whether, if the trial is bifurcated, the jury should be instructed as to the minimum and maximum fines for a felony offense.

The issue of whether to instruct the jury that they may infer intoxication from a blood alcohol content of .10 percent for a DUI first offender or a blood alcohol content of .08 percent for a DUI second or subsequent offender was addressed by our supreme court in Robinson, 29 S.W.3d at 481-483.[5] The supreme court agreed with the procedure previously recommended by this court in State v. Michael Elmore Robinson, No. 01C01-9612-CC-00536, 1999 WL 16802, at *4, (Tenn. Crim. App. at Nashville, January 19, 1999). Robinson, 29 S.W.3d at 482. Specifically, the supreme court stated that

> [a] trial court should hold a hearing outside the presence of the jury and make a formal finding on the record as to whether the defendant has prior DUI convictions before instructing the jury pursuant to Tenn. Code Ann. § 55-10-408(b) [as to an inference of intoxication upon proof of a blood alcohol content of .08 or more for a DUI multiple offender]. . . . As in this case, a trial court must also instruct the jury that it may draw an inference of intoxication from the blood alcohol evidence but that it is not required to do so.

Id. (citations and footnote omitted); see also State v. Susan Blackburn, No. M1999-00295-CCA-R3-CD, 2000 WL 1130158, at *6-7 (Tenn. Crim. App. at Nashville, July 25, 2000), perm. to appeal denied, (Tenn. 2001). Additionally, we note that the jury should not be informed of the reason for which they are allowed to infer the defendant's intoxication when the defendant's blood alcohol content is .08 percent or more. Id. at 482 n. 3. Thus, the jury will not be informed, prior to the second stage of the proceeding, that the defendant has prior DUI convictions. See Robinson, No. 01C01-9612-CC-00536, 1999 WL 16802, at *4; see also State v. Stacy D. Williford, No. 02C01-9710-CC-00416, 1998 WL 886589, at *6 (Tenn. Crim. App. at Jackson, December 21, 1998).

> In connection with this issue, we emphasize the following language from Robinson: [w]e stress[]. . .that a trial court should avoid the use of the term "presumption" in its instructions to the jury, except for the

[5] We note that Robinson, 29 S.W.3d at 476 was published after the State filed its application for an interlocutory appeal.

> presumption of innocence. . . .[I]n the place of the term "presumption," the jury "may be instructed that a permissible inference may or may not be drawn of an elemental fact from proof by the State of a basic fact, but that such inference may be rebutted and the inference places no burden of proof of any kind upon defendant."

29 S.W.3d at 481 (citations omitted). Accordingly, a trial court must find, outside the presence of the jury, whether the defendant is a multiple DUI offender. Upon so finding, the trial court may instruct the jury that it is permissible for the jury to *infer*, not presume, the defendant's intoxication upon proof that the defendant's blood alcohol content was .08 percent or more at the time of the offense.

Also, the trial court may instruct the jury as to the misdemeanor fine for DUI, first offense, during the first phase of the proceeding and then reinstruct the jury concerning the fine for DUI, second or subsequent offense, during the second phase. Even if the jury imposes a fine for the misdemeanor DUI conviction, "such fine [will be] neutralized when the [defendant is] convicted of driving while under the influence of an intoxicant, [multiple] offense." State v. Mark Weems, No. 89-276-III, 1990 WL 45697, at *3 (Tenn. Crim. App. at Nashville, April 19, 1990). However, if the jury does not find that the defendant is a DUI multiple offender and accordingly enhance the defendant's sentence and fine, then the misdemeanor may be imposed.

III. Conclusion

Based upon the forgoing, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE